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No. 98-654

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY AND TRANSPORTATION DISPLAYS, INC.,

Petitioners,

v.

CHRIST'S BRIDE MINISTRIES, INC.,

Respondent.

Petition for Writ of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED[1]

1. Whether the decision below correctly determined that the Southeastern Pennsylvania Transportation Authority ("SEPTA") and Transportation Displays, Inc. ("TDI") by their policies and practices of allowing a wide variety of commercial, public-service, public-issue, and political messages, and in the absence of specific guidelines to curtail the exercise of unfettered government discretion, created a designated public forum thereby triggering strict First Amendment scrutiny?

2. Whether the actions by SEPTA and TDI in restricting the message of Christ's Bride Ministries, Inc. ("CBM") because of its particular view taken on the subject of abortion is constitutionally permissible even in a non-public forum?

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[1]It is the opinion of the Respondents that if the Court were to grant the Petitioners' Writ of Certiorari the above "Questions Presented" more accurately describe the issues that would properly be before the Court.

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STATEMENT OF THE CASE

The Defendants, Southeastern Pennsylvania Transportation Authority ("SEPTA") and Transportation Displays, Inc. ("TDI"), are a metropolitan transit authority serving the Philadelphia, Pennsylvania area, and its advertising licensee or agent, respectively. Together they promulgated and applied the "TDI Cares" program to promote, through advertising displays on SEPTA property, issues worthy of public debate and specifically dedicated SEPTA display areas to raise public awareness. The stated purpose of the program is "to focus consciousness on an issue of pressing human concern."[2] The promotional literature for the "TDI Cares" program states that people are "assailed by images, both poignant and creative, which are designed to elevate awareness and provide a catalyst for change . . . . Th[is] intent is in keeping with TDI's corporate philosophy:

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[2] It is a priori that the issues of breast cancer and abortion are of pressing human concern.

to make a contribution to the communities in which we belong, and to encourage public interest in issues which we, as individuals, can act to effect a change." Under this program SEPTA allows posters advocating controversial social/political issues. The only specifically stated restriction is that "[n]o libelous, slanderous, or obscene[3] advertising may be accepted . . . for display." Otherwise, "[a]ny advertising determined by . . . SEPTA, in its sole discretion, as objectionable . . . may not be utilized."[4]

In 1995, Christ's Bride Ministries, Inc. ("CBM") began a "Loving, Life-sparing" public service campaign. The purpose of the campaign was to communicate to the public the increased risk of breast cancer for women who have aborted

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[3] There has never been any issue or argument in this instance that the advertising in question constitutes libelous, slanderous, or obscene advertising.

[4] In their Petition for Writ of Certiorari the Petitioners, in footnote 2, state additional standards for review of advertising. However, these terms are not specified in the terms of the contract. While these additional standards may in some circumstances be applied; their application in any given instance, therefore, is at the unfettered discretion of the reviewing authority.

their pregnancies. In the furtherance of this campaign CBM sought to display posters in areas with high pedestrian traffic, such as the display areas designated by SEPTA under the "TDI Cares" program.

In accordance with a contractual agreement with SEPTA/TDI, CBM produced and displayed numerous posters in the areas designated by SEPTA. However, three weeks after the posters were displayed SEPTA received a letter in opposition[5] to the content of the posters written by the Assistant Secretary of Health, United States Department of Health and Human Services. Based on the objections stated in this letter SEPTA/TDI removed the posters.

CBM filed a complaint seeking declaratory relief, preliminary and permanent injunctions, and compensatory damages. The allegations involved violations of CBM's free

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[5] The content of the posters almost immediately "became the source of rider protest, criticism by women's health organizations, local government officials and media inquiry." SEPTA/TDI representatives testified that the public's response to the content of posters is always a factor in deciding whether to allow posters to be displayed.

speech rights under the First and Fourteenth Amendments to the United States Constitution, violation of equal protection under the laws, and a breach of contract.[6]

After a trial on the merits the District Court determined that SEPTA/TDI had not created a designated[7] public forum[8] and therefore any limitations on free speech were not subject to strict scrutiny. Rather, "SEPTA may 'restrain speech based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.'"[9] Applying

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[6] The District Court's denial of the breach of contract claim was summarily upheld by the Court of Appeals. The breach of contract claim is not an issue before this Court.

[7] That the display areas in this instance do not constitute a traditional public forum is not disputed.

[8] In analyzing the forum the District Court "variously defined the forum at issue as 'the stations in a public transit system,' a 'public transportation system,' and 'SEPTA's subway and rail stations and their advertising space.'" (Petition for Writ of Certiorari Appendix 15a.)

[9] "SEPTA has permitted advertising in subway and rail stations on both sides of the abortion debate. SEPTA has allowed messages advocating a women's right to choose abortion and advertisements for medical clinics providing pregnancy termination services. On the other hand, SEPTA has run numerous contrary advertisements. For example, there have been signs urging teenagers to practice abstinence, offering counseling services

this standard the District Court upheld SEPTA's/TDI's removal of the posters as being reasonable and viewpoint neutral.[10]

The Third Circuit Court of Appeals determined that SEPTA/TDI by their policies and practices of allowing a wide variety of commercial, public-service, public-issue, and political messages, and in the absence of specific guidelines to curtail the exercise of unfettered government discretion, created a designated public forum[11] subjecting any limitations

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to pregnant women, and encouraging pregnant women to consider adoption as an alternative to terminating a pregnancy." (Petition for Writ of Certiorari Appendix 47a, 22a-23a.)

[10] This is in spite of the fact that CBM's posters were removed after receipt of and in reliance upon a letter in opposition to the posters indicating that the posters were inaccurate. By relying on the letter, without any investigation into the accuracy of the message or the letter, SEPTA/TDI targeted the "specific view taken by [CBM] on the subject." *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). By definition this is viewpoint based discrimination. The actions of SEPTA/TDI permitted "one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992).

[11] In analyzing the forum the Court of Appeals looked to the access sought by CBM to display posters in the advertising space leased out by SEPTA. "The contract between the parties contemplated advertising with posters in the stations and next to the clocks at Suburban Station in Philadelphia. We conclude, therefore, that the forum at issue is SEPTA's

on free speech to strict scrutiny. Applying this standard the restrictions applied to CBM's advertising were unconstitutional. Additionally, the Court of Appeals determined that even if the forum was not a designated public forum the removal of the posters was not reasonable under the circumstances and therefore a constitutional violation.[12]

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S DECISION IN *ARKANSAS EDUC. TELEVISION COMM'N V. FORBES*, 118 S. CT. 1633 (1998).

In *Forbes* this Court began by explaining that "the public forum doctrine should not be extended in a mechanical way to the very different context of public television broadcasting."

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advertising space." (Petition for Writ of Certiorari Appendix 15a-16a.) The forum was not the rail and subway stations as a whole.

[12] The Court of Appeals never specifically addressed the issue of the "viewpoint" of the policy and actions of SEPTA/TDI associated with the review of limitations on free speech in a non-public forum. However, their analysis of the reasonableness of the actions of SEPTA/TDI include elements of a "viewpoint" examination.

Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1638 (1998).[13] "[I]t is well settled that the First Amendment has a special meaning in the broadcasting context." *Federal Communications Comm'n v. Pacifica Foundation*, 438 U.S. 726, 741 (1978). "[B]road rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations. . . . Public and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming." *Forbes*, 118 S. Ct. at 1639. However, from within this general context of not applying the forum doctrine to public broadcasting the Court then acknowledges that "candidate debates" present issues that give rise to a narrow

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[13] "[E]ach medium of expression presents special First Amendment problems. . . . And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Federal Communications Comm'n v. Pacifica Foundation*, 438 U.S. 726, 748 (1978).

exception. "The special characteristics of candidate debates support the conclusion that the AETC debate was a forum of some type. The question of what type must be answered by reference to our public forum precedents. . . ." *Id.* at 1640.

Addressing this question the Court reiterated the standards for determining the nature of any particular forum, but paid particular attention to the distinctions between general and selective access.[14] The Court determined that AETC did not open up its forum to general access but rather specifically limited access on a selective basis. Therefore, the forum was not a designated public forum.[15]

In the instance presently before this Court, the Third Circuit Court of Appeals applied the same standards espoused in *Forbes*, although the analysis did not focus particular

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[14] This does not mean, as the Petitioners seem to intimate, that the Court espoused any new standard for determining the type of forum. Rather the context of this debate more clearly illustrated this distinction.

[15] The Court then went on to explain that the actions of AETC in a non-public forum were reasonable and viewpoint neutral.

attention to the distinctions between general and selective access.[16] In essence, however, the Third Circuit determined that SEPTA/TDI by its actions and policy of accepting political speech, public service announcements, and commercial speech granted general access to its forum thereby creating a designated public forum subject to strict scrutiny.[17] The Court of Appeals' disagreement with SEPTA's contention that a blanket reservation constitutes selective access does not mean that the Court of Appeals failed to follow the precedent of this Court.[18] Accordingly the Petition for Writ of Certiorari should be denied.

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[16] Particular attention was not drawn to this distinction because, unlike *Forbes*, the context of the case did not as clearly illustrate the distinction.

[17] This is the same analysis that was applied by the Second Circuit Court of Appeals in *New York Magazine v. Metropolitan Transportation Authority*, 136 F.3d 123 (2d Cir. 1998).

[18] A review of cases applying the public forum doctrine shows that selective access arises in those cases in which the government limits access to a particular class of speech, such as commercial, but general access occurs when access is granted to political, religious, and commercial speech. *See e.g.*: *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 977 (9th Cir. 1998); *Widmar v. Vincent*, 454 U.S. 263 (1981); *New York Magazine*, 136 F.3d at 123.

II.

THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS AND CORRECTLY ANALYZES AND APPLIES THIS COURT'S PRECEDENT APPLICABLE IN DETERMINING GOVERNMENT INTENT TO DESIGNATE A PUBLIC FORUM AND THE SIGNIFICANCE OF THE GOVERNMENT'S UNFETTERED RESERVATION OF DISCRETION TO SELECT AMONG MESSAGES BASED UPON CONTENT.

The Petitioners state that the decision of the Court of Appeals is inconsistent with the forum analysis employed by other Circuits, specifically citing decisions of the Second and Ninth Circuit Courts of Appeals. However, in a recent decision the Ninth Circuit Court of Appeals explicitly states that the decision of the Third Circuit in this instance is not inconsistent with the decisions of that Court.[19] *See Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 977 (9th Cir.

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[19] The supposed conflict raised by the Petitioners is with *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*, 941 F.2d 817 (9th Cir. 1991). However, in that instance the public school never opened the forum to outside advertisers and therefore never created a designated public forum.

1998). *Children of the Rosary* involved an instance where nonprofit organizations sought to advertise political/religious messages on the buses of the transit authority. However, the express written policy of the transit authority only allowed the display of commercial advertising.[20] Under these circumstances the Ninth Circuit held that the government did not create a designated public forum, and specifically acknowledged and distinguished the decision of the Third Circuit Court of Appeals in this instance on the basis that the transit authority, sub judice, promulgated no policy governing removal of advertisements after it had allowed both commercial and political speech. *Id.* at 977.

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[20] It must be noted that irrespective of the Petitioners' assertion to the contrary this Court's decisions in *Perry Educ. Assn. v. Perry Local Educators Assn., 460 U.S. 37 (1983)* and *Cornelius v. NAACP Legal Defense & Education Fund, Inc., 473 U.S. 788 (1985)* are consistent with the decisions and analysis of the First, Second, Third, Seventh, and Ninth Circuits. In both *Perry* and *Cornelius* the government did not open the forum to a particular type of speech and therefore did not create a designated public forum. Not every instrumentality used for communication is a traditional public forum or a designated public forum. A speaker may be excluded from a nonpublic forum if he wishes to address a topic not within the purpose of the forum. *See United States v. Kokinda*, 497 U.S. 720 (1990).

The Second Circuit Court of Appeals,[21] in a case that is factually on point, specifically retreated from the opinion of the District Court sub judice, stating that "it cannot be true that if the government excludes any category of speech from a forum through a rule or standard, that forum becomes ipso facto a non public forum. . . ." *New York Magazine v. The Metropolitan Transportation Authority,* 136 F.3d 123, 128 (2d Cir. 1998). The Second Circuit noted that the reasoning of the District Court[22] "would allow every designated public forum to be converted into a non-public forum the moment the

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[21] The Petitioners attempt to raise a conflict with the Second Circuit Court of Appeals decision in *Lebron v. National Railroad Passenger Corporation (AMTRAK),* 69 F.3d 650 (2d Cir. 1995). However, just as the Third Circuit in this instance correctly looked at the access sought to determine the appropriate forum, the Second Circuit in *Lebron* limited its forum analysis to the "Spectacular". *Id.* at 655. *See e.g. Air Line Pilots Association v. Department of Aviation,* 45 F.3d 1144 (7th Cir. 1995). With this limitation the Second Circuit determined that the "Spectacular" was not a designated public forum since AMTRAK's practice was clear; "it ha[d] never opened the Spectacular for anything except purely commercial advertising." *Id.* at 655. That is not the situation here where SEPTA/TDI by their policy and practice opened the forum to both political and commercial speech.

[22] Specifically the rationale that if the government retains control over the types of advertising that may be displayed, a designated public forum cannot be created. *New York Magazine,* 136 F.3d at 128.

government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content." *Id.* at 128.

New York Magazine involved advertising on transit authority property.[23] Under the terms of its contract and by its policy and practices the transit authority allowed both commercial and political speech. By its acceptance of political speech and its lack of standards to guide the government's discretion the transit authority created a designated public forum subjecting any limitations on free speech to strict scrutiny. *Id.* at 130. Accordingly the most recent and factually on point decision of the Second Circuit Court of Appeals is in agreement with the Third Circuit in both its conclusion and analysis.[24]

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[23] The advertising agent for MTA in *New York Magazine* was TDI, the same advertising agent for SEPTA.

[24] The Petitioners attempt to create a split among the Circuits as to the importance of the government acting in its proprietary capacity or regulatory capacity in forum analysis. However, while the Petitioners may disagree with the decisions of the Circuit Courts of Appeal on this issue, that in and of itself does not raise a conflict. In cases involving

The common analysis as outlined by the precedent of this Court and employed by the Courts of Appeals for the various Circuits in determining the nature of the forum is really quite simple: "A designated public forum is a nontraditional forum that the government has opened for expressive activity by part or all of the public." *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 976 (9th Cir. 1998), *citing Perry Educ. Assn. v. Perry Local Educators Assn.*, 460 U.S. 37, 46 & n.7 (1983). "The creation of a designated public forum requires a decision 'intentionally opening a nontraditional forum for public discourse.'" *Id.* at 97 (*quoting Cornelius v. NAACP Legal Defense & Educ. Fund Inc.*, 473 U.S. 788, 802 (1985)), and *citing Arkansas Educational Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1641 (1998). "Hence, the Court

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forum analysis the government is considered to be acting in its proprietary capacity when it is acting for the purpose of raising revenue or facilitating the conduct of its own internal business. *New York Magazine*, 136 F.3d at 128. In applying the forum analysis this Court and the Circuits have consistently held that when the government opens up a forum for political or religious speech, the government is acting in its regulatory capacity and not as a proprietor.

has looked to the policy and practice of the government, the nature of the property and its compatibility with expressive activity. . . ." *Id.* at 976. Determining the intent of the government is precisely the analysis that compels the examination into the policy and practice of the government in establishing the forum for expressive activity. *See Stewart v. Dist. of Columbia Armory Bd.*, 863 F.2d 1013 (3rd Cir. 1988). "Determining the government's intent is an inherently factual inquiry that should not be resolved without due attention to an underlying record." *Air Line Pilots Assn.*, 45 F.3d at 1152. This is exactly the analysis followed by the Court of Appeals below. For these reasons the Petition for Writ of Certiorari should be denied.

III.

THE DECISION OF THE COURT OF APPEALS IS CONSISTANT WITH THE PRECEDENT OF THIS COURT WITH RESPECT TO THE STANDARD APPLICABLE TO NON-PUBLIC FORA.

The Third Circuit Court of Appeals correctly stated and applied the standard of review[25] applicable to a non-public forum. "When reviewing a governmental agency's limitation of speech on government property that has not been designated a public forum, the 'reasonableness' of action limiting speech is gauged with reference to the nature of the forum itself." (Petition for Writ of Certiorari Appendix 29a).[26] Determining

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[25] Because the Third Circuit determined that the actions of SEPTA/TDI were not reasonable the Court never fully addressed the issue of viewpoint neutrality as required by the precedents of this Court. However, the actions of SEPTA/TDI clearly are not viewpoint neutral since they favored one side of the debate over the other. *See e.g. R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). "Our case is more akin to the Government's creation of a band shell in which all types of music might be performed except for rap music. The provisions here are content-based discriminations in the strong sense of suppressing a certain form of expression that the Government dislikes, or otherwise wishes to exclude on account of its effects, and there is no justification for anything but strict scrutiny here." *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727, 802 (1996) (Justice Kennedy, concurring and dissenting). "It was SEPTA, however, which accepted advertising on a permitted topic, and then decided that CBM's ad was unacceptably misleading." (Petition for Writ of Certiorari Appendix 33a)

[26] In explaining this standard the Third Circuit relied upon this Court's precedents in *United States v. Kokinda*, 497 U.S. 720, 732 (1990) (*quoting Heffron v. International Society of Krishna Consciousness*, 452 U.S. 640 (1981)); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 270, 273 (1988); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985); *Lee v. Intern. Soc. for Krishna Consciousness, Inc.*, 505 U.S. 672, 685 (1992); and *Lehman v. City of Shaker Heights*, 418

the reasonableness of any limitation is necessarily factually dependent. It should be noted that even if as in the case sub judice, the government contends that it is an applicable standard for allowing access to the relevant forum, the proper analysis for the court is to examine the policy and practice to determine if in fact a standard exists, whether the standard is consistently enforced, and, whether a standard existed prior to the application of the limitation. "This factual inquiry . . . guards against the dangers of post-hoc policy formulation or the discretionary enforcement of an effectively inoperative policy. The government may not 'create' a policy to implement its newly discovered desire to suppress a particular message." *Air Line Pilots Assn.*, 45 F.3d at 1153. Accordingly, the Third Circuit reviewed the factual basis for the nature of the forum[27] and the limitations imposed by

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U.S. 298, 303 (1974).

[27] "CBM paid the commercial rate for the advertising space, just like any other advertiser, and submitted an advertisement on abortion and women's health, topics that were already the subject of other permitted advertisements. The subject of the speech, and the manner in which it

SEPTA/TDI. After conducting this review the Court of Appeals determined the exclusion of respondent's message to be unreasonable.

The Petitioners state that the basis for this decision was the failure of SEPTA/TDI to allow CBM to provide evidence to contradict the letter in opposition received from Dr. Lee. However, this misstates the Court's opinion.[28] The actual basis for the Court of Appeals determination was that SEPTA/TDI had no standard[29] by which the reasonableness

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was presented, were compatible with the purposes of the forum." (Petition for Writ of Certiorari Appendix 31a)

[28] The Court of Appeals noted that SEPTA/TDI stated that they had a standard of not allowing advertising that was not supported by credible evidence. If this were the standard then the actions of SEPTA/TDI were unreasonable because they failed to follow this standard. (Petition for Writ of Certiorari Appendix 32a – 33a)

[29] "SEPTA has left us to guess why, in terms of the purpose of the forum, it excluded CBM's ad, and why, and to what extent, other ads will also be excluded." (Petition for Writ of Certiorari Appendix 32a)

of their actions could be determined.[30] For it is "[I]ndeed, the creation of standards and adherence to them, even when it means affording protection to speech unpopular or distasteful, [that] is the central achievement of . . . First Amendment jurisprudence." *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727, 784 (1995) (Justice Kennedy, concurring and dissenting). Because the Third Circuit Court of Appeals correctly stated and applied the standard for reviewing government limitations of free speech in a non-public forum, the Petition for Writ of Certiorari should be denied.

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[30] "This is all the more true where SEPTA has failed to explain how its content-based distinctions are related to preserving the advertising space for its intended use, and where SEPTA has no policy, old or new, written or unwritten, governing the display of ads making contested claims." (Petition for Writ of Certiorari Appendix 33a)

IV.

CONCLUSION

For the reasons set forth the Respondent, Christ's Bride Ministries, Inc., respectfully requests that this Court deny Petitioners' Petition for Writ of Certiorari to review the Judgment and Opinion of the Third Circuit Court of Appeals.

Respectfully submitted,

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